

THE
SPEECH

OF

Sir Constantine Phipps,
Late Lord CHANCELLOR of IRELAND,

AGAINST

The Lords Pronouncing Judgment upon the Earl of
WINTON.

MAY it please your Lordships, we that have the Honour to be assigned by your Lordships as Council in this Case, do humbly apprehend the Impeachment against the noble Lord at the Bar to be Insufficient; it is so uncertain, that we (with the greatest Submission) take it no Judgment can be given upon it. My Lords, we beg leave to take Notice to your Lordships, that in Indictments in the Courts below, even for Trespasses, the Law requires the certain Day when the Offence is supposed to be committed to be alledged, and if a particular Day be not laid, the Indictment is insufficient. And if such Certainty is requisite in Offences of the most minute Nature, it is much more so in capital Crimes, and more still in Offences of the highest Nature, such as Treason, with which this noble Lord is charged.

My Lords, There be two Reasons why, in Indictments for High Treason, a certain Day should be assigned when the Treason was committed.

One is for the Advantage of the Prisoner, that being apprised not only of the Facts with which he is charged, but also of the Time when those Facts are supposed to be committed, he may be the better able to make his Defence: It is possible he may have Witnesses to prove he was at another Place, and in other Company, at the Time when he is accused to have committed the Treason, or may by other Circumstances make his Innocence appear.

The second Reason is for the Benefit of the Crown, that it may be known to what Time the Forfeiture shall relate; for in Treason the Forfeiture relates to the Time laid in the Indictment, and if there be no precise Time alledged in the Indictment, the Forfeiture can relate no further than to the Judgment.

My Lords, the Forfeitures in Cases of Treason are very great, therefore we conceive, with humble Submission, that the Accusation ought to contain all the Certainty it is capable of, that the Prisoner may not by general Allegations be rendered incapable to defend himself in a Case which may prove so fatal to him.

Our Books, my Lords, furnish us with many Instances where Indictments have been held to be insufficient, for less Faults than not specifying the Day when the Offence was committed; but in Cases so plain, I will not trouble your Lordships with citing Authorities, for I believe there is not one Gentleman of the long Robe but will agree an Indictment for any capital Offence to be erroneous, if the Offence be not alledged to be committed upon a certain Day.

My Lords, an Attainder upon an Impeachment subjects the Offender to the same Punishment, the same Forfeitures, as an Attainder upon an Indictment: and therefore I am at a loss to find out a Reason why there should not be the same Certainty in one, as in the other; if equal Certainty be required in both, then we humbly submit to your Lordship's Judgment whether this Impeachment be not erroneous and insufficient, in that there is no particular certain Time alledged when the Treason or the Over-Acts were committed. The Treason alledged is conspiring and imagining the Death of the King, and the Impeachment sets forth, "That the Conspirators (and names them) as false Traytors to his present most sacred Majesty King GEORGE, the only lawful and undoubted Sovereign of these Kingdoms, having withdrawn their Allegiance, and cordial Love, and true and due Obedience, which they, as good and faithful Subjects, owed to his said Majesty, did, in or about the Months of September, October, or November, 1715. most wickedly, maliciously, falsely and traitorously

reously imagine and compass the Death of his most sacred Majesty. ' My Lords, a Prosecution by Impeachment is a Proceeding at the Common Law, for *Lex Parliamentaria* is a Part of the Common Law; and we humbly submit it to your Lordships Consideration, whether there is not the same Certainty required in one Method of Proceeding at the Common Law as in another?

Your Lordships observe with what Uncertainty, as to the Time, the Treason is alledged. 'Tis said to be in or about the Months of *September, October, or November, 1715*. Who is able to say to which of these Months, much less to what Day of either of these Months the Forfeitures shall relate? And how is it possible for the noble Lord, the Prisoner at the Bar, to make a Defence to a Charge so general, unless he bring for Witnesses all those Persons with whom he has had any Conversation during these Three Months at least.

My Lords, The Overt-Acts are alledged with the same Insufficiency and Uncertainty as the Treason it self is; for in charging the first Overt-Act, which is conspiring to levy War and to depose the King, it is said, ' That for accomplishing and executing their said traiterous Purposes, they the said *James Earl of Derwentwater, &c.* did, in or about the said Months, or some of them, and at diverse other Times and at diverse other Places within this Kingdom, wickedly and traiterously agree, confederate, &c. to raise, excite, and levy, within the Counties of *Teviotdale, Northumberland, Cumberland, and the County-Palatine of Chester*, and elsewhere within this Kingdom, a most cruel, bloody and destructive War against his Majesty, in order to depose and murder his sacred Majesty, and to deprive him of his Royal State, Crown, and Dignity. ' My Lords can any thing be more uncertainly alledged, than to say that the Conspirators did, in or about the said Months, or some of them, and at diverse other Times and at diverse other Places within this Kingdom, confederate, &c. to levy War within the Counties of *Teviotdale, Northumberland, Cumberland, and County-Palatine of Chester*, and elsewhere within this Kingdom?

The next Overt-Act, which is actual levying War, is not laid with greater Certainty; for the Impeachment sets forth, ' That the said Earl of *Derwentwater, &c.* their Accomplices and Confederates, *in or about the Months* aforesaid, in the Counties, aforesaid *or some of them*, did gather together great Numbers of his Majesty's Subjects, and with them did assemble in a Warlike and Traiterous manner, in order to raise Tumults and Rebellion within this Kingdom; and having procured great Quantities of Arms, Ammunition, and Warlike Instruments, *at the Times and Places aforesaid, or some of them*, did form and compose, or did assist in forming and composing an Army of Men, consisting of his Majesty's liege Subjects, in order to wage War against his said Majesty, for and in Behalf, and in Favour of the said Pretender to the Crown of these Realms; at the Time and Times and Places aforesaid, *and at divers other Times and Places* within this Kingdom, the said Conspirators did levy and raise War and Rebellion against his most Sacred Majesty, &c.

The next Overt-Act is proclaiming the Pretender, which is more uncertain than any of the other; for the Impeachment sets forth, ' That the aforesaid Conspirators, *during their March and Invasion aforesaid*, in open Defiance of his most Sacred Majesty's just and undoubted Title to the Imperial Crown of these Realms, did wickedly and traiterously cause and procure the said Pretender to be proclaimed in the most publick and solemn manner as King of these Realms.

Here is no certain Time or Place alledged when or where the Pretender was proclaim'd, but only that it was during their March and Invasion.

The last Overt-Act seems to be laid with greater Certainty than the rest; for 'tis said, ' That the Conspirators did, on or about the 9th, 10th, 11th, 12th, or 13th of *November* aforesaid, traiterously seize and possess themselves of the Town of *Preston*, in the County-Palatine of *Lancaster*, against his Majesty, and did then, and there, in a Warlike and Hostile Manner, levy War, oppose, engage, and fight against his Majesty's Forces, and did then and there cause and procure a miserable and horrid Slaughter and Murder of many of his Majesty's faithful Subjects. ' Here indeed are particular Days mention'd, but then the Words *or about* leave it at large, for no Man can tell how many Days may be included in these Words *or about*. We humbly apprehend that a Charge of this high Nature ought not to be alledged with such uncertainty, and that the Impeachment is as erroneous as an Indictment drawn in this Manner would be; this being a Proceeding of the same Nature, and according to the Course of the Common Law.

My Lords, I do not pretend any great Skill in Parliamentary Proceedings, but presume to say that in my little Experience in Business in other Courts, I never saw a Charge exhibited against any one that was laid in so uncertain a Manner, unless in Libels in the Ecclesiastical or Admiralty Courts, which cannot in the least influence the Case now before your Lordships; this (as I have observed) being a Proceeding according to the Course of the Common Law.

Upon the whole Matter I humbly submit to your Lordships Judgment, whether for the Reasons I have offer'd to your Lordships Consideration, the Impeachment is not erroneous, whether your Lordships will think fit to proceed to Judgement against the noble Lord the Prisoner at the Bar upon an Impeachment so uncertain and insufficient as I humbly apprehend this to be.